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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

OLIVER L. NORTH, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a facially valid indictment may be attacked—either before trial or after an error-free trial—on the ground that evidence presented to the grand jury may have been affected by the defendant's immunized testimony.

2. Whether the evidence of witnesses who have a present, independent recollection of events must be excluded from consideration by the grand and petit juries because those witnesses' memories may have been refreshed by exposure to immunized testimony.

3. Whether, in a case where the defendant testified under a grant of immunity, the trial judge must conduct an item-by-item examination of the grand jury and trial evidence to ensure that it was not affected by the immunized testimony, even when the prosecutors were not exposed to the immunized testimony, the witnesses were identified without reference to the immunized testimony, and the grand jury and trial witnesses were directed to testify only from their personal knowledge of events.

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PETITION FOR A WRIT OF CERTIORARI

The Independent Counsel, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-218a) is reported at 910 F.2d 843; the court's opinion on rehearing (App., *infra*, 219a-260a) is reported at 920 F.2d 940. The principal opinion of the district court (App., *infra*, 269a-301a) is reported at 716 F. Supp. 644.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1990, and a timely petition for rehearing was denied on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

18 U.S.C. 6002 provides:

> Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

On March 16, 1988, respondent Oliver L. North and others were charged in a 23-count indictment with a variety of offenses relating to the series of events generally known as the "Iran/Contra affair." The charges against the defendants were severed, and each defendant was tried separately. Four of the 16 counts against North were dismissed prior to trial. After a 12-week

trial on the remaining counts, North was convicted of aiding and abetting the obstruction of a congressional inquiry, in violation of 18 U.S.C. 1505 and 2 (Count 6); willfully and unlawfully altering, destroying and removing official documents of the United States, in violation of 18 U.S.C. 2071(b) (Count 9); and accepting an illegal gratuity, in violation of 18 U.S.C. 201(c)(1) (Count 10). He was sentenced to concurrent terms of two years' probation on each count. The convictions were vacated on appeal. App., *infra*, 1a-218a.

1. As summarized by the district court, the Iran/Contra affair involved "a secret operation to place funds, including funds generated from an authorized government initiative to free American hostages, into unauthorized hands for their personal profit, by deceiving Congress, obstructing investigations, altering documents, abusing tax laws, and by other means prohibited by law." App., *infra*, 270a. The evidence at trial established that North, while an official at the National Security Council, was a principal participant in the affair.

On December 19, 1986, an Independent Counsel was appointed under 28 U.S.C. 593(b) to investigate the possibility that criminal offenses were committed in the course of the Iran/Contra affair. A grand jury was empaneled on January 28, 1987, and began receiving evidence shortly thereafter. App., *infra*, 272a-273a. By the time it recessed on June 29, 1987, the grand jury had heard a wide range of witnesses (App., *infra*, at 283a-284a); it received evidence from another 89 witnesses after reconvening in September 1987, although "[m]any of these witnesses had previously appeared or were simply more routine witnesses associated with document identification and other formal steps preparatory to indictment." App., *infra*, 284a. The indictment was returned on March 16, 1988. App., *infra*, 128a.

Congress, meanwhile, had commenced its own investigation of the Iran/Contra affair. See App., *infra*, 271a-

274a. When North declined to cooperate with congressional investigators, he received use immunity pursuant to 18 U.S.C. 6002. App., *infra*, 273a. He gave his congressional testimony on July 7-10, 1987, while the grand jury was in recess. App., *infra*, 128a. That testimony was televised and widely reported by the press. App., *infra*, 2a.

2. Prior to trial, North moved to dismiss the indictment on the ground that his immunized testimony had affected evidence placed before the grand jury, in violation of the Fifth Amendment and the mandate of *Kastigar* v. *United States*, 406 U.S. 441 (1972). The district court held a hearing to explore the issue, at which the Independent Counsel testified and was cross-examined. See App., *infra*, 300a. The district judge also "personally reviewed" a variety of other evidentiary materials, including the grand jury transcripts and exhibits; materials relating to precautions taken by the Independent Counsel and his staff to avoid exposure to North's immunized testimony; and documentation of the Independent Counsel's leads to the government's witnesses. App., *infra*, 282a. See App., *infra*, 300a-301a. In considering this material, the district court focused, among other things, on "[s]afeguards and techniques adopted by Independent Counsel to prevent inadvertent or derivative exposure of immune testimony by witnesses appearing before the grand jury." App., *infra*, 284a.

With this material in mind, the district court denied North's motion. App., *infra*, 269a-301a. In doing so, the court made a number of specific factual findings. At the outset, it determined that "[n]o immunized testimony of any defendant was ever presented to the grand jury at any time in whole or in part." App., *infra*, 284a. The court also found that the prosecutors had not been directly exposed to North's testimony, explaining that the government's prophylactic procedures "reflect[ed] a scrupulous awareness of the strictures against exposure and a conscientious attempt to avoid even the most re-

mote possibility of any impermissible taint." App., *infra*, 294a. The court noted that similar prophylactic procedures were also employed in an effort to protect against use of North's immunized testimony by witnesses who appeared before the grand jury: all witnesses were instructed by the government to "make sure that your answers to our questions are based solely on your own personal knowledge and recollection of the events in question. Do not relate to us anything which you learned for the first time as a result of listening to or reading or hearing about immunized testimony." App., *infra*, 291a. Finally, the court found "that all the prosecutor's substantive witnesses were known to him before the first immunity grant." App., *infra*, 294a (footnote omitted).

The court did note that some witnesses "had their memories refreshed by the immunized testimony" (App., *infra*, 295a); the court observed that "[n]one of this apparently occurred because someone wanted to harm a defendant or help the prosecution; it simply occurred in the natural course of events." *Id.* The court concluded, however, that a detailed factual inquiry into the matter was not necessary, explaining that "[n]o court has ever so required, nor did *Kastigar* suggest anything of the kind." *Id.* (footnote omitted). In all, the trial judge found that "[n]othing has developed in the Court's preliminary inquiry into *Kastigar* and related problems which suggests the defendants who received use immunity have had their Fifth Amendment rights impaired in a manner that significantly affects their right to a fair trial." App., *infra*, 297a.

At trial, the district judge implemented similar procedures to ensure that the content of testimony would not be affected by North's immunized disclosures. He thus instructed each witness "not to testify to any matter, except for matters you know of your own personal knowledge. You are not to testify to anything that you learned because you heard, read or listened to any portion of Col. North's testimony up before the Iran-Contra pro-

ceeding." App., *infra*, 294a n.4. North was convicted on three counts. App., *infra*, 314a-317a.[1]

The district court subsequently rejected North's post-trial Fifth Amendment arguments, finding that the renewed motion sought "in most instances to relitigate issues already resolved by the Court, presenting no new information that would justify changing the Court's [initial opinion] dealing with the full range of *Kastigar* problems." App., *infra*, 318a. The court added that "[t]he motion presents no basis for an evidentiary hearing." *Id.* The trial judge did, however, order the government to provide North with all materials previously submitted to the court *ex parte* that were relevant to the *Kastigar* issues. App., *infra*, 318a-319a. Even after obtaining these materials, North did not allege that any specific piece of evidence adduced against him was the product of his immunized testimony, and the trial judge accordingly denied North's motion for reconsideration of the post-trial *Kastigar* ruling. App., *infra*, 321a.

3. A divided panel of the court of appeals set aside the convictions. App., *infra*, 1a-218a. In relevant part,[2] the court concluded that receipt of testimony from witnesses whose memories had been refreshed by exposure to North's immunized disclosures constituted improper

[1] Two counts were dismissed prior to trial, one as duplicative and the other for improper venue. In addition, the government moved to dismiss two counts when the Attorney General refused to allow public disclosure of relevant classified information.

[2] The court also held that the trial judge erred in limiting the jury's consideration of certain evidence relating to intent in connection with the charge under Section 2071. App., *infra*, 68a-76a. In addition, the court initially held that the trial judge gave an erroneous unanimity instruction relating to that same count (App., *infra*, 45a-56a), but it reversed that determination on rehearing. App., *infra*, 238a-239a. The court rejected a wide range of other challenges to the convictions. App., *infra*, 56a-68a, 76a-125a.

"evidentiary use" of North's statements. App., *infra*, 20a-25a. The majority accordingly directed the district court to determine as to each witness whether it is possible "to separate the wheat of the witnesses' unspoiled memory from the chaff of North's immunized testimony" (App., *infra*, 24a) and, if it is not, to exclude evidence presented by such witnesses.

The court of appeals also concluded that the trial judge's instructions to witnesses were inadequate to prevent them from testifying to matters that they had first learned from North's immunized disclosures, accepting North's argument that "witnesses could not possibly filter each answer through the court's hypothetical 'prior knowledge' test." App., *infra*, 36a (citation omitted). The court therefore held that the trial judge was obligated, on remand, to "hold a full *Kastigar* hearing that will inquire into the *content* as well as the *sources* of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item." App., *infra*, 44a-45a (emphasis in original). The court explained that the district judge was required to "make express findings that the government has carried [its] heavy burden as to the content of *all* of the testimony of *each* witness." App., *infra*, 45a (emphasis added).

The majority added that this scrutiny must be directed to the testimony before the grand jury, as well as that at trial. The court acknowledged that "a facially valid indictment need not be dismissed solely because the grand jury has considered evidence that would be inadmissible at trial because that evidence was obtained in violation of some constitutional or statutory prohibition." App., *infra*, 37a. It held, however, that this rule applies only when "the allegedly unlawful or unconstitutional action is independent of or prior to the consideration by the grand jury of that action's consequences." *Id.* In contrast, the court concluded, "[w]here immunized testi-

mony is used before a grand jury, the prohibited act is simultaneous and coterminous with the presentation." *Id.*

Chief Judge Wald dissented (App., *infra*, 126a-163a), declining to find that "Judge Gesell's prodigious and conscientious efforts to protect North's fifth amendment rights were in any way so ineffectual as to require a reversal on the formalistic grounds that the majority advances." App., *infra*, 147a. She noted that virtually all of the grand jury evidence relating to the counts on which North was convicted had been presented *prior* to North's congressional appearance. App., *infra*, 135a-137a. And she found it "indeed striking that North's counsel cannot point to a single instance of alleged witness testimony tainted by exposure to North's immunized testimony." App., *infra*, 134a. In all, she observed that the procedural regime imposed by the majority "makes a subsequent trial of any congressionally immunized witness virtually impossible." App., *infra*, 146a.

The panel reaffirmed its initial conclusions when it denied rehearing. App., *infra*, 219a-250a.[3] The court forcefully restated its view that "the defendant is entitled to a *hearing* at which he would be able to challenge the prosecution's case for non-use" (App., *infra*, 224a (emphasis in original)), labeling it "quite a remarkable proposition" that an in-chambers review of relevant evidentiary material "could substitute for an adversary hearing." App., *infra*, 225a. See App., *infra*, 227a. And the court again held that the consideration of tainted evi-

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[3] The court appeared to modify its opinion in two respects, however. It retreated somewhat from the suggestion in its initial opinion that the government could establish a lack of taint only by showing that a witness never had been exposed to the immunized testimony, or that all of his evidence had been "'canned'" prior to exposure. App., *infra*, 44a-45a. See App., *infra*, 223a-224a. At the same time, however, the court added another element to the showing required on remand: whether government witnesses were motivated to testify by the immunized testimony. App., *infra*, 222a.

dence by the grand jury may be challenged after conviction. App., *infra*, 231a-235a.

Chief Judge Wald again dissented. App., *infra*, 240a-255a. She concluded that the procedures employed by the district court—under which the government effectively made a prima facie showing that "no illegal 'use' of immunized testimony was made" (App., *infra*, 249a)—were adequate; she suggested that the majority's contrary conclusion "represents an unneeded and unprecedented incursion into the trial court's discretion in managing a fair trial." App., *infra*, 250a (footnote omitted). See App., *infra*, 246a-247a. She also faulted the majority for failing to recognize that any use of the tainted evidence in this case may have been too attenuated to raise constitutional concerns (see App., *infra*, 250a-254a), noting that "[t]he question is a deep and unsettled one in current constitutional law." App., *infra*, 253a.

REASONS FOR GRANTING THE PETITION

The notoriety of the events underlying this case should not obscure the significance of the legal issues presented here. By entertaining North's challenge to a facially valid indictment, the court of appeals sanctioned an extraordinary intrusion into the grand jury process; by holding that errors before the grand jury may invalidate a conviction even if the trial was error-free, the court unduly minimized the importance of the harmless error rule. These holdings involve recurring issues of enormous practical importance to the criminal justice system—issues that have prompted extensive litigation and conflicting decisions in the courts of appeals.

At the same time, the court of appeals' ruling on the merits imposes substantive and procedural requirements of unprecedented strictness on the prosecution of persons who have given public immunized testimony. That ruling, as Chief Judge Wald noted below, establishes "practically unattainable • • • requirements not found

in *Kastigar* [v. *United States*, 406 U.S. 441 (1972)]" that will "render[] impossible in virtually all cases the prosecution of persons whose immunized testimony is of such national significance as to be the subject of congressional hearings and media coverage." App., *infra*, 241a. The rules governing such cases, which invariably involve issues of the most fundamental public import, and which require sensitive judgments by Congress whether to grant immunity to actual or potential subjects of criminal investigations, should be settled by this Court. Indeed, even apart from the propriety of the court of appeals' ruling on its own terms, tension between the decision below and the holdings of other courts has created uncertainties about the likely effect of grants of immunity—uncertainties that already are impairing Congress's legislative and oversight functions. Against this background, "[i]t is difficult," as Chief Judge Wald observed, "to think of a case of more exceptional importance." App., *infra*, 255a.

I. THE DERIVATIVE USE OF IMMUNIZED TESTIMONY BY A GRAND JURY WITNESS IS NOT A BASIS FOR SEEKING DISMISSAL OF AN INDICTMENT

In vacating the conviction in this case, the court of appeals directed the district judge to hold an adversary hearing to review in detail the evidence presented to the grand jury as well as that offered at trial. The court held that the indictment must be dismissed if North's immunized testimony is found to have tainted the evidence placed before the grand jury, unless the presentation of the tainted evidence is found to be harmless beyond a reasonable doubt. App., *infra*, 44a-45a. In our view, this ruling is insupportable. It will interfere with the secrecy of grand jury proceedings and cause inordinate delay in the prosecution of criminal cases, concerns underlying this Court's repeated holdings that "[a]n indictment returned by a legally constituted and unbiased grand jury * * * if valid on its face, is enough to call

for trial of the charge on the merits." *United States* v. *Costello*, 350 U.S. 359, 363 (1956) (footnote omitted). And if following remand the trial is found to have been untainted (assuming that a remand remains necessary after this Court's consideration of the case), the holding below would vitiate the proceedings to date even though any error before the grand jury could have had no effect on the ultimate outcome of the prosecution. Not surprisingly, this aspect of the court of appeals' ruling also is inconsistent with the holdings of this and other courts. Because these issues recur with great frequency—they are, in fact, likely to arise in any prosecution of a person who gave immunized testimony prior to indictment— review by this Court plainly is warranted.

A. A Defendant May Not Attack a Facially Valid Indictment on the Ground That the Grand Jury's Consideration of Evidence May Have Been Tainted by Immunized Testimony

1. The court of appeals acknowledged this Court's repeated holdings, in *United States* v. *Costello*, *supra*, *United States* v. *Calandra*, 414 U.S. 338 (1974), *United States* v. *Blue*, 384 U.S. 251 (1966), and *Lawn* v. *United States*, 355 U.S. 339 (1958), that "a facially valid indictment need not be dismissed solely because the grand jury has considered evidence that would be inadmissible at trial because that evidence was obtained in violation of some constitutional or statutory provision." App., *infra*, 37a. But the court held that this rule has no application when it is immunized testimony, as opposed to some other sort of inadmissible material, that finds its way before a grand jury. App., *infra*, 37a-41a, 231a-235a. In such circumstances, the court concluded, the Constitution requires dismissal even of a facially valid indictment returned by a properly constituted grand jury. Two other courts of appeals have reached the same result. *United States* v. *Beery*, 678 F.2d 856, 860 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985); *United States* v.

Hampton, 775 F.2d 1479, 1491 (11th Cir. 1985) (import of the *Costello* line of cases not addressed).

Those holdings, however, are flatly inconsistent with decisions of the Second and Fourth Circuits. In *United States* v. *Rivieccio*, 919 F.2d 812 (2d Cir. 1990), the Second Circuit rejected a claim—identical in all relevant respects to the one here—that consideration of immunized testimony by a grand jury required dismissal of the indictment. While assuming that the grand jury had been exposed to tainted evidence (*id.* at 816-817), the *Rivieccio* court declared it "fundamental in our system of criminal justice that 'an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence.'" *Id.* at 816, quoting *United States* v. *Washington*, 431 U.S. 181, 185 n.3 (1977). Citing *Calandra*, *Blue*, *Lawn*, *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 109 S.Ct. 1494 (1989), and *Gelbard* v. *United States*, 408 U.S. 41 (1972), the Second Circuit added that this Court "has consistently recognized this rule as applying to claims that an indictment was based on evidence obtained in violation of the privilege against self-incrimination" (919 F.2d at 816), concluding that "[n]either the enactment of 18 U.S.C. § 6001 *et seq.* nor *Kastigar* have altered the effect of this rule." *Id.*

It did not matter to the Second Circuit that the grand jury proceedings may have entailed a violation of the defendant's constitutional privilege. As the court explained:

> Because 'the real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him,' *Feldman* v. *United States*, 322 U.S. 487, 500 (1943) [*sic*] (Black, J., dissenting) [parallel citations

> omitted], we believe that a violation of either the privilege against self-incrimination or 18 U.S.C. § 6002 requires only suppression at trial of a defendant's compelled testimony. Accordingly, when the Government violates 18 U.S.C. § 6002 by using immunized testimony before a grand jury, generally the remedy for the violation is the suppression of the tainted evidence at trial, not a dismissal of the indictment.

Id. at 816 (footnote omitted).[4]

The Fourth Circuit reached an identical conclusion in *United States* v. *Society of Independent Gasoline Marketers* (*"SIGMA"*), 624 F.2d 461 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981). There, a defendant who had received an informal grant of use immunity made incriminating statements to the prosecutor in the presence of a witness, who subsequently gave tainted testimony before the grand jury and at trial. *Id.* at 469-471. The Fourth Circuit vacated the *conviction* to remedy the use of the defendant's immunized statements at trial. But the court declined to dismiss the indictment, relying on *Blue* and *Lawn* to hold that similar use of the state-

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[4] The Second Circuit noted two circumstances in which—evidently in the exercise of the court's supervisory authority—it might be appropriate to look behind the indictment: when the defendant testifies before the same grand jury that indicts him, or when the government concedes that the indictment "rests almost exclusively" on tainted evidence. 919 F.2d at 816 n.4. Whatever the validity of these exceptions, cf. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988), neither is present in this case. There has been no suggestion here that the prosecution intentionally exploited North's congressional testimony; to the contrary, the court of appeals acknowledged that the prosecutors were wholly insulated from the immunized disclosures. App., *infra*, 19a. And the grand jury taint here, if it existed at all, was far from pervasive. Indeed, as Chief Judge Wald demonstrated below, virtually all of the witnesses who testified as to matters involving the counts on which North was convicted appeared before the grand jury *prior* to North's immunized testimony. App., *infra*, 134a.

ments before the grand jury does "not entitle[] [a defendant] to avoid trial by securing dismissal of his indictment. His remedy is suppression of his statement." *Id.* at 473-474 (citation omitted). The decision in this case cannot be reconciled with *SIGMA*; indeed, the court below expressly "decline[d] to follow the Fourth Circuit." App., *infra*, 41a.

2. It should be added that the court of appeals' decision cannot, in fact, be squared with this Court's holdings in the *Costello* line of cases. Because "the grand jury does not finally adjudicate guilt or innocence" (*Calandra*, 414 U.S. at 349)—and because defendants are not entitled "to a rule which would result in interminable delay but add nothing to the assurance of a fair trial" (*Costello*, 350 U.S. at 364)—this Court has held that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *; or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." *Calandra*, 414 U.S. at 345.

Thus in *Blue*, the Court found dismissal of an indictment inappropriate in response to a claim that the grand jury had been exposed to compelled testimony, explaining that "this would not be a basis for abating the prosecution pending a new indictment" (384 U.S. at 255 n.3); the Court added that the defendant "would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." *Id.* at 255. The Court used identical reasoning in *Lawn*, holding that the defendant was not entitled even to inquire into the asserted use of compelled testimony by the grand jury. 355 U.S. at 349-350. See generally *United States* v. *R. Enterprises, Inc.*, 59 U.S.L.W. 4077, 4079 (1991); *Bank of Nova Scotia*, 487 U.S. at 261.[5]

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[5] Contrary to the assumption of the majority below in its opinion on rehearing, our position in no way depends on any conclusion

In nevertheless looking behind the indictment here, the court of appeals sought to distinguish this Court's decisions by suggesting that they "involve the presentation to the grand jury of evidence *previously* obtained in violation of a defendant's privilege against self-incrimination." App., *infra*, 232a (emphasis in original) (footnote omitted). In contrast, the court continued, the presentation of immunized testimony to the grand jury "amounts to a constitutional violation in and of itself." App., *infra*, 233a. Therefore, the court of appeals concluded, cases such as *Lawn* and *Blue* involved the formulation of remedies for past violations of the Fifth Amendment, while the use of immunized testimony is itself a violation of the Constitution. See App., *infra*, 232a-235a & n.8.

This rather metaphysical distinction, however, is far removed from the concerns of judicial economy, preservation of grand jury secrecy, and swift resolution of criminal charges that were adduced in *Calandra* (see 414 U.S. at 349), *Lawn* (see 355 U.S. at 349-350), and *Costello* (see 350 U.S. at 363-364) as important reasons for limiting the grounds on which facially valid indictments may be attacked. Equally as important, the court of appeals' reasoning is premised on a fundamental misunderstanding of the Fifth Amendment. The privilege against self-incrimination may, of course, be invoked outside of formal criminal proceedings as a prophylactic measure. See *Maness* v. *Myers*, 419 U.S. 449, 464 (1975); *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974). But this Court has explained that the privilege essentially "is a fundamental *trial* right of criminal defendants. • • • Although conduct by law enforcement officials prior to trial may ultimately impair that right, a *constitutional violation*

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that the Fifth Amendment permits a grand jury to rely upon an individual's compelled statements in determining whether to indict him. Our point is that, once an indictment is returned that is based upon tainted evidence, such a "violation of the defendant's right against self-incrimination does not trigger the Grand Jury Clause's 'right not to be tried.'" *Midland Asphalt*, 109 S.Ct. at 1499-1500.

occurs only at trial." *United States* v. *Verdugo-Urquidez*, 110 S.Ct. 1056, 1060 (1990) (emphasis added). See generally *Kastigar*, 406 U.S. at 453; *Maness*, 419 U.S. at 473 (White, J., concurring in the result); *Feldman* v. *United States*, 322 U.S. 487, 500 (1944) (Black, J., dissenting). As a consequence, the *use* of compelled testimony by the grand juries in *Blue* and *Lawn* was no more and no less a violation of the Constitution than was the asserted use of immunized testimony here. The court of appeals' distinction between rights and remedies accordingly does not justify its disregard for this Court's decisions.

That is made clear by the Court's most recent consideration of the *Costello* issue in the Fifth Amendment setting; citing *Lawn*, the Court explained that "even the *grand jury's violation* of the defendant's right against self-incrimination" is not to be remedied by dismissal of the indictment. *Midland Asphalt*, 109 S.Ct. at 1499-1550 (emphasis added). In response to this statement of the law, which appears to dispose of North's attack on the indictment, the court below was able to suggest only that the presentation of immunized testimony might have "caused 'the grand jury no longer to be a grand jury'" (App., *infra*, 41a) within the meaning of that phrase as used in *Midland Asphalt*, 109 S.Ct. 1499-1500. But that is a profound misunderstanding of the *Midland Asphalt* decision, which indicated that only defects "so fundamental" as to change the basic character of the proceeding might cause the grand jury not to be a grand jury—and which offered a violation of the Fifth Amendment privilege as an example of the sort of error that "does *not* trigger the Grand Jury Clause's 'right not to be tried.'" *Id.* at 1499 (emphasis added).

Indeed, both Congress and this Court have made clear that the statutory prohibition on the use of immunized testimony is "analogous to the Fifth Amendment requirement in cases of coerced confessions." *Kastigar*, 406 U.S. at 461. See *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 278

(1983) (Blackmun, J., concurring in the judgment). And the statutory immunity itself is "'of the same scope as that frequently, even though unintentionally, conferred as a result of constitutional violations by law enforcement officers.'" *Kastigar*, 406 U.S. at 452 n.36 (citation omitted). See *Pillsbury*, 459 U.S. at 277 (Blackmun, J., concurring in the judgment). The decision below, which distinguishes between the treatment accorded immunized testimony and that accorded other types of compelled statements, is a wholly unwarranted departure from that understanding.

B. The Claim That a Grand Jury Improperly Considered Evidence Derived From Immunized Testimony Is Not a Basis for Attacking an Otherwise Valid Conviction

There is another, related flaw in the court of appeals' treatment of the indictment that warrants this Court's attention. As noted above, the court of appeals required the district judge to scrutinize the evidence that was placed before the grand jury—and to dismiss the indictment if that evidence was tainted—regardless of whether the trial proceeded without error. App., *infra*, 44a-45a. But even assuming that presentation of evidence derived from a defendant's coerced testimony might justify pretrial dismissal of the indictment, it hardly follows that the same failing requires reversal of the conviction after an untainted trial. In fact, that result cannot be squared with decisions of this Court and of other courts of appeals.

1. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court held that a violation before the grand jury of Fed. R. Crim. P. 6(d) is not remediable after conviction because, "[m]easured by the petit jury's verdict, * * * any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable

doubt." 475 U.S. at 70 (footnote omitted). The Court found it immaterial that defendants may be entitled to error-free proceedings at the charging as well as the trial stage:

> Even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, "the moving finger writes; and, having writ, moves on."

Id. at 71. The Court added that, while the societal costs of reversal and retrial may be unavoidable when a tainted proceeding "has deprived a defendant of a fair determination of the issue of guilt or innocence," the "balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." *Id.* at 72.

This reasoning plainly has application here. Indeed, in *Rivieccio* the Second Circuit, while in terms finding it unnecessary to rely on *Mechanik* (see 919 F.2d at 817 n.5), concluded that "any misuse of the immunized testimony which may have occurred before the indicting Grand Jury was rendered harmless" by the defendant's conviction. *Id.* at 817. In such circumstances, the court saw " 'no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events.' In other words, no harm, no foul." *Id.* (footnote omitted), quoting *United States* v. *Gallo*, 859 F.2d 1078, 1084 (2d Cir. 1988), cert. denied, 490 U.S. 1089 (1989).

2. As this tension between the decision below and the Second Circuit's reasoning in *Rivieccio* suggests, since *Mechanik* "the federal courts of appeal have struggled to define what non-trial errors remain reviewable after a

defendant has been convicted." *United States* v. *Spillone*, 879 F.2d 514, 521 (9th Cir. 1989), cert. denied, 111 S.Ct. 210 (1990). This Court expressly reserved the issue in *Midland Asphalt*. 109 S.Ct. at 1498. The result has been marked disarray in the courts of appeals.

Thus the Third, Ninth, and Tenth Circuits have held that "*Mechanik* was not intended to preclude the post-conviction review of assertions of errors that implicate more than merely technical deficiencies." *United States* v. *Johns*, 858 F.2d 154, 159 (3d Cir. 1988). See *United States* v. *Fisher*, 871 F.2d 444, 449 (3d Cir. 1989), cert. denied, 111 S.Ct. 66 (1990); *Spillone*, 879 F.2d at 521; *United States* v. *Taylor*, 798 F.2d 1337, 1338 (10th Cir. 1986). The Seventh Circuit, in contrast, has expressly rejected the Tenth Circuit's holding that "*Mechanik* is limited to 'technical violations' before the grand jury." *United States* v. *Fountain*, 840 F.2d 509, 515 (7th Cir.), cert. denied, 488 U.S. 982 (1988). See *Spillone*, 879 F.2d at 522 n.4 (noting conflict).

Even apart from this express conflict, uncertainty about the scope of *Mechanik* has played out across the courts of appeals. Two circuits, for example, have held that claims attacking the prosecutors' failure to present exculpatory evidence to the grand jury are appealable after *Mechanik* (*Johns*, 858 F.2d at 156, 159; *Taylor*, 798 F.2d at 1338, 1340); two others have reached the contrary conclusion. *Fountain*, 840 F.2d at 514-515; *United States* v. *Kouba*, 822 F.2d 768, 773-774 (8th Cir. 1987) (alternative holding). One circuit has held that violations of Fed. R. Crim. P. 6(e) remain appealable post-trial (*Johns*, 858 F.2d at 158-159); another court has disagreed (at least where the error did not affect the fairness of the trial). *United States* v. *Friedman*, 854 F.2d 535, 583 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989). See *United States* v. *Helmsley*, 866 F.2d 19, 21 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989). Two courts have held that perjury by prosecution witnesses

before the grand jury may be challenged after conviction (*Fisher*, 871 F.2d at 448; *Spillone*, 879 F.2d at 524-525); a third reached the contrary conclusion. *United States* v. *Mount*, 896 F.2d 612, 624 (1st Cir. 1990) (alternative holding). One court held that use of a so-called "perjury trap" may be challenged after conviction, likening such a "trap" to vindictive or selective prosecution (*United States* v. *Howard*, 867 F.2d 548, 551-552 (9th Cir. 1989)); another court, in contrast, declined to entertain a post-conviction argument that the indictment had been obtained out of political animosity. *United States* v. *Ruiz*, 894 F.2d 501, 504 (2d Cir. 1990) (alternative holding).

In all, these questions relating to the grand jury are of extraordinary practical importance. They already have produced extensive, and inconclusive, litigation in the courts of appeals. This case presents a suitable vehicle in which to address them.

II. NO IMPROPER USE WAS MADE OF IMMUNIZED TESTIMONY IN THIS CASE

For all of its verbiage, the court of appeals' ruling on the merits—requiring a detailed reexamination of the testimony of the grand jury and trial witnesses—had two foundations. One ground was substantive: noting the district court's observation that the memories of certain witnesses had been refreshed by North's immunized disclosures (App., *infra*, 12a), the court of appeals found that such an application of immunized testimony is an impermissible "evidentiary use." App., *infra*, 20a. The second element of the court's holding, procedural in nature, rested on its conclusion that the steps taken by the trial judge failed to guarantee that the content of the witnesses' testimony (and perhaps their motivation to testify) had not been affected by North's immunized disclosures. Instead, the court held that adequate assurances may be provided only by a full adversary hearing (seem-

ingly in every case in which witnesses are exposed to immunized testimony) that examines "the *content* as well as the *sources* of the grand jury and trial witnesses' testimony," and that proceeds "witness-by-witness; if necessary, * * * line-by-line and item-by-item." App., *infra*, 44a-45a (emphasis in original).

This decision, of course, will affect many cases in which the defendant is prosecuted after the dissemination of immunized testimony. And it will have its most profound impact on prosecutions involving public immunized testimony—in particular, testimony before Congress—that is widely disseminated. In such cases, the court of appeals' ruling on refreshed recollection will require a complex psychological inquiry into the thought processes and memory of every witness. At the same time, the large number of witnesses potentially exposed to immunized testimony in cases involving newsworthy events means that the court of appeals' draconian procedural requirements will, as Chief Judge Wald observed, "consume[] countless extra weeks or months of trial." App., *infra*, 126a. In all, then, the ruling below may in practice amount to "an absolute deterrent of any prosecution after a grant of immunity in a high-profile case." App., *infra*, 145a.

These consequences have particular importance because the cases most sharply affected by the court of appeals' new rules will, by definition, be prosecutions involving conduct that has "far-flung implications for national policy" (App., *infra*, 147a)—those where Congress has determined that the national interest requires an immediate public examination of the activity at issue. The list of past instances where Congress brought Section 6002 into play thus reads like a catalog of the most notable examples of misconduct involving public officials or matters of public policy: in addition to the Iran/Contra affair, it includes the Watergate, "Koreagate," and ABSCAM scandals; congressional ethics inquiries; impeachment proceedings against federal judges; inquires into nar-

cotics trafficking, assassinations, and organized crime; investigations of fraud, corruption, and mismanagement on Indian reservations; and most recently, allegations of misconduct at the Department of Housing and Urban Development and of improper favors for savings and loan officials.

Yet it seems self-evident that the decision of the court of appeals will have a substantial chilling effect on the use of immunity orders to further congressional inquiries. See, *e.g.*, J. Biskupic, *Hill Reconsiders Immunity As North Case Is Set Back*, Cong. Q. Weekly Rep. 1 (Aug. 18, 1990). After all, "[t]he decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." *United States* v. *Doe*, 465 U.S. 605, 616 (1984). If the court of appeals has erred, this Court should right that error before significant further damage is done to the legislative oversight function. In any event, given the nature of the cases affected by the decision below and the impact of that decision upon important activities of a coordinate branch of government, it is imperative that the issues addressed by the court of appeals be settled by this Court.

A. The Possibility That Exposure to Immunized Testimony Refreshed a Witness's Own Independent Recollection Does Not Require Exclusion of That Witness's Testimony

The court of appeals' holding that a trial judge must exclude evidence provided by witnesses whose memories might have been refreshed by exposure to immunized testimony rested entirely on the general proposition that any use whatever of immunized testimony is impermissible. App., *infra*, 20a-25a. In assessing that analysis, it is useful to bear in mind what actually happened in this case. There is no suggestion that the prosecutors—who themselves were unaware of the content of North's statements to Congress—showed the immunized testimony to

the witnesses or otherwise "used" it to refresh the witnesses' recollections within the ordinary meaning of that term; the witnesses simply read or heard the testimony "in the natural course of events." App., *infra*, 295a. Nor did the witnesses learn new information from North. Instead, the district judge indicated only that their own memories had been "stirred" or "stimulated" by exposure to North's immunized statements. App., *infra*, 295a. The question here, then, is whether the evidence offered by a witness testifying from his or her own present, independent recollection must be excluded in such circumstances. In our view, it need not be.

It is true, of course, that the evidence presented by such a witness might not have been available in the absence of the immunized testimony. But in assessing assertions that evidence must be excluded as the product of a constitutional violation, the Court repeatedly has "rejected a 'but for' approach to the admissibility of such statements." *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980). It has done so in the Fourth Amendment setting, for example, explaining that the test in such cases is "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). Thus in *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963) (citation omitted), using a metaphor that has since proved inescapable, the Court declared:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which • • • objection is made has been come at by exploitation of that illegality or

> instead by means sufficiently distinguishable to be purged of the primary taint."

See *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

The Court also has squarely rejected a " 'but for' analysis" under the Fifth Amendment (*United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980)), finding attenuation concepts applicable there as well. See *Nix* v. *Williams*, 467 U.S. 431, 442 (1984); *Pillsbury*, 459 U.S. at 278-279 n.3 (Blackmun, J., concurring in the judgment). Using another time-tested metaphor, the Court has recognized that, while there almost inevitably is a causal connection between a coerced self-incriminating statement and a subsequent voluntary confession, the second confession nevertheless may be admissible:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first. But this Court never has gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

United States v. *Bayer*, 331 U.S. 532, 540-541 (1947). See *Pillsbury*, 459 U.S. at 279 (Blackmun, J., concurring in the judgment); *Clewis* v. *Texas*, 368 U.S. 707 (1967).

Because an individual is as much "compelled" by the proverbial rubber hose as by a court order, these limitations on the scope of the "fruits" doctrine plainly are applicable in immunity cases. Indeed, as we explain above, the statutory immunity was intended to mirror the Fifth Amendment privilege. In particular, Congress specifically endorsed *Wong Sun*, "the seminal case on what is commonly known as the 'fruits' doctrine." *Pills-*

bury, 459 U.S. at 277 (Blackmun, J., concurring in the judgment). See S. Rep. No. 617, 91st Cong., 1st Sess. 145 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 42, 80-81 (1970); H.R. Rep. No. 1188, 91st Cong., 2d Sess. 12 (1970). Against this background, as Chief Judge Wald noted below, "it would stand to reason that the exclusionary mandate of the use-immunity statute may also be limited as the proffered evidence becomes more and more remote from the original immunized statement." App., *infra*, 252a.

With this in mind, exposure of a witness to immunized testimony that happens to refresh his recollection, especially when not the result of prosecutorial contrivance, is too remote a "use" to warrant exclusion of the witness's evidence. Because the witness in such a case (as in this one) testifies from his own present and independent recollection of events, the immunized statements are not themselves placed before the grand or petit juries. Because the government in such a case (as in this one) finds all of its witnesses without reference to the immunized testimony, that testimony does not (to introduce yet another venerable metaphor) function as a "link in the chain of evidence." *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988). And because the prosecutors in such a case (as in this one) never themselves have seen the immunized statements, the case hardly is one where the evidence is obtained " 'by exploitation of th[e] illegality.' " *Wong Sun*, 371 U.S. at 479-480 (citation omitted).

In this light, it is not surprising that the court of appeals' holding on refreshed testimony is wholly unprecedented. While there have been any number of prosecutions of persons whose immunized testimony was widely disseminated (see, *e.g.*, *United States* v. *Biaggi*, 909 F.2d 662, 689-690 (2d Cir. 1990), pet. for cert. pending, No. 90-937; *United States* v. *Serrano*, 870 F.2d 1, 13 (1st Cir. 1989); *United States* v. *Romano*, 583

F.2d 1, 4 (1st Cir. 1978)), or otherwise became known to grand jury or trial witnesses (see, *e.g.*, *United States* v. *Lipkis*, 770 F.2d 1447, 1451 (9th Cir. 1985); *United States* v. *Byrd*, 765 F.2d 1524, 1526-1527, 1529 (11th Cir. 1985); *United States* v. *Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984)), until the decision below no court had raised the possibility that refreshment of recollection might be a bar to the introduction of evidence. To the contrary, in related settings it generally has been understood that "illegally obtained evidence may be used to refresh a witness' memory." *United States* v. *Kusek*, 844 F.2d 942, 949 (2d Cir.), cert. denied, 488 U.S. 860 (1988). The court below offered no sound reason to depart from that practice here.

B. Neither the Fifth Amendment nor *Kastigar* Requires the Use of Particular Procedures by the District Court in Assessing the Impact of Immunized Testimony

The court of appeals also constructed a procedural edifice to provide absolute assurance that the testimony of grand jury and trial witnesses had not been altered by or derived from North's immunized disclosures; in the court's view, achieving this goal required an adversary hearing that would examine every bit of grand jury and trial evidence—and that would extend even to witnesses who testified only as to counts on which North was acquitted. App., *infra*, 35a n.2. Needless to say, we agree that witnesses may not present evidence about matters that they learn from the defendant's immunized testimony. But the court of appeals' rigid procedural rules impose serious and wholly unwarranted practical impediments to the prosecution of any case in which immunity has been granted.

In *Kastigar* itself, the Court indicated that the government has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate

source wholly independent of the compelled testimony." 406 U.S. at 460. See *Braswell* v. *United States*, 487 U.S. 99, 117 (1988). But the Court did not address the procedures that might be used to carry this burden. Moreover, despite its practical importance, the Court has not revisited the issue in the intervening years.

In effectuating *Kastigar*'s mandate, the district court in this case scrutinized the testimony to ensure that none of North's immunized disclosures were, in terms, presented to the grand jury or at trial. See App., *infra*, 284a. The district judge also made findings—deemed correct by the court of appeals (App., *infra*, 19a)—that the prosecutors had not been exposed to the immunized testimony (App., *infra*, 293a-294a) and that *all* of the government's witnesses had been identified by means unrelated to that testimony (App., *infra*, 294-295a). And to ensure that the content of the trial testimony would not be affected by North's disclosures, the trial judge instructed each witness:

> Before we get started, • • • I want to be sure that you understand the rules under which we are operating here. You are not to testify to any matter, except for matters you know of your own personal knowledge. You are not to testify to anything you learned because you heard, read or listened to any portion of Col. North's testimony up before the Iran-Contra proceeding. And if you are asked a question and you don't know in your own mind whether your answer is derived from his testimony or something you know independently, you are not to answer it.
>
> Do you follow me?

App., *infra*, 294a n.4. The prosecutors gave similar instructions to each grand jury witness who appeared after North's immunized testimony. See App., *infra*, 291a. Finally, the district judge ensured that the defense obtained all memorialized statements of the government's witnesses, so that it would have every opportunity to explore whether there were grounds to believe

that immunized testimony had made its way into statements by witnesses before the grand jury or at trial. In fact, North has never at any stage of the proceeding made a specific claim of improper use. See App., *infra*, 134a.

As Chief Judge Wald's opinion below demonstrates (App., *infra*, 246a-247a), this approach—which requires the government to make a prima facie showing that "its evidence is derived from a legitimate source" (*Kastigar*, 406 U.S. at 460) and then shifts the burden of going forward with particular evidentiary challenges to the defense (while leaving the ultimate burden of persuasion on the government)—is eminently sensible. It requires the government to establish in detail that investigatory leads were identified without reference to, and that the prosecutors were insulated from, the immunized testimony; taint of that sort potentially is the most problematic because it may occur outside the presence of the court. Protection against improper influences on witness testimony, on the other hand, may be substantially secured in the first instance by the court's instructions. Certainly, there is nothing in *Kastigar* that is inconsistent with this approach. And it is considerably more favorable to the defense than the regime established by the Court in the Fourth Amendment setting, where a defendant seeking suppression "must go forward with specific evidence demonstrating taint." *Alderman* v. *United States*, 394 U.S. 165, 183 (1969). See *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1969). See also *Nardone*, 308 U.S. at 342.

In nevertheless finding the use of warnings to witnesses inadequate—and demanding instead "line-by-line and item-by-item" findings as to each bit of evidence—the court of appeals simply adopted North's assertion that "witnesses could not possibly filter each answer through the [district] court's hypothetical 'prior knowledge' test." App., *infra*, 36a (citation omitted). But there is no reason why that should be so. To the contrary, our

system is premised on the presumption that all participants in a trial will follow the judge's instructions. And it is fundamental that witnesses may testify only as to matters about which they have personal knowledge (see Fed. R. Evid. 602 and Advisory Committee Notes), a requirement that presupposes the ability of witnesses to separate out things that they know from things that they have been told. If the court of appeals' contrary assumption were true, no witness who had been exposed to immunized testimony ever would be able to present evidence —a conclusion that has been universally rejected.

Having said this, it remains true that a careful review of the evidence will be necessary when there is some concrete, articulable reason to believe that the testimony of particular witnesses has been tainted. The court of appeals' blanket holding, however, imposes unnecessary burdens on an entire category of prosecutions. It is a truism that "[d]ispatch in the trial of criminal causes is essential in bringing crime to book." *Nardone*, 308 U.S. at 341. Yet the court of appeals, in its quest for absolute assurance that immunized testimony had no effect on this case, has mandated evidentiary hearings that in many cases—and certainly here—would far exceed the trial in length and complexity. That holding stands in some tension with the conclusion of other courts of appeals that "the government does not have to 'negate all abstract "possibility" of taint.'" *United States* v. *Dynalectric*, 859 F.2d 1559, 1578 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) (citation omitted). Its tenor also is difficult to square with the common sense determinations of other courts that *Kastigar* hearings are not necessary in all cases. See, *e.g.*, *Biaggi*, 909 F.2d at 689-690; *Dynalectric*, 859 F.2d at 1589; *United States* v. *Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987), cert. denied, 488 U.S. 831 (1988). Cf. *Taglianetti*, 394 U.S. at 317.

"When all is said and done, the issue comes down to whether the Constitution requires that the trial judge

conduct a full-scale hearing as to the source of every line of testimony emanating from any witness who has been exposed to immunized testimony, wholly independent of any action by the prosecutor, and even when the defense can provide no evidence whatsoever that the witness was influenced by the exposure." App., *infra*, 253a-254a. That issue should be determined by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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